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Workmen's Compensation Decisions

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pendens filed. HELD: That no fraud or conspiracy was proved as neither C. nor intervenor owed a duty to record the instruments; that filing of lis pendens gave plaintiff no rights of priority, but merely put intervenor upon notice to present its claims to the real estate; that defendant C. has an interest in the real estate which may be reached by execution, and that plaintiff is entitled in an equity action to have such interest determined and subjected to the lien of its judgment.

Sullivan vs. Soo Railway Co. Plaintiff, a member of a section crew, while riding on a gasoline speeder to place where work was to be performed, was thrown from speeder when it ran into a main line switch, left open by order of the conductor of a work train. The foreman of the section crew, located at the front end of the speeder, failed to notice a target placed near the open switch, and the members of his crew, who had been ordered to watch for trains from behind, also failed to note it. The evidence was conflicting on the issue of whether plaintiff's injuries—testified by plaintiff as injury to left ankle, bruise on left hip, injury to back and to bladder—were due to the accident or to constitutional disease, the symptoms noted by the physicians probably supporting either theory, but physical findings strongly indicated the presence of the disease while plaintiff was with the army in France, at which time an operation for such disease was performed. Judgment was entered for plaintiff at $20,000. HELD: The rule is elementary that it is only when the evidence is such that reasonable men must be driven to the conclusion that plaintiff was not acting with reasonable care for his own safety and that his failure to do so was the cause of the injury that the court is warranted in holding contributory negligence to be a bar to recovery. Judgment was, however, reduced to $12,000, and new trial ordered in case plaintiff refused to accept the reduction.

State Bar Association meets at Grand Forks, September 6 and 7.

WORKMEN'S COMPENSATION DECISIONS

Where deceased employee is not the parent with whom children resided at time of injury, and the other parent survives, children's right to compensation rests on their dependency on deceased at the time of the injury and proof thereof must be made. *Ocean Accident & Guarantee Corp. vs. Industrial Commission,* 255 *Pac.* 598 (Arizona).

Telephone operator, using head set, alleged she received a shock by reason of "banging noise" in ear, resulting in disability, is not entitled to award where the evidence does not clearly relate the injury to the employment. Liability can not be based on choice between two views, equally compatible with evidence. *Bell Telephone Co. vs. Industrial Commission,* 156 *N. E.* 319 (Illinois). (Evidently contra to holding of N. Dak., in Brown vs. Bureau.)

An award for permanent total disability is justified only where the employee has been rendered wholly and permanently incapable of work at a gainful occupation. The burden of proof is on claimant and where it appears he is able to do light work, the burden of proof has not been sustained.—*Consolidated Coal Co. vs. Industrial Commission,* 156 *N. E.* 358 (Illinois).

The test of dependency of parents of deceased employee, killed in course of employment, is whether the contributions were used for support of the family and were necessary; and where support is thus supplied, but part of it is used for the support of the child only the excess can be considered.—*Clover Fork Coal Co. vs. Ayres,* 292 *S. W.* 803 (Kentucky).

A minor child, living with mother after justified separation from her husband, is entitled to compensation as dependent of father killed in course of employment, as the decedent was bound under the law for the child's support, and such right is not affected by the wife's misconduct in living with another man after separation.—*Thurman vs. Union Indemnity Co.* 156 *N. E.* 28 (Mass.).

Claimant, using his own motor truck to make occasional hauls at stated price per load, the loading and unloading points being designated but there being no other supervision or control, was an independent contractor and not an employee.—*Moore vs. Kilcen & Gillis,* 213 *N. W.* 49 (Minn.).

The law does not raise a presumption that an injury was received in the course of employment, and where testimony showed that a scratch was obtained between time of return to work at noon and time when claimant washed his hands at five o'clock is insufficient.—*Karlson vs. Rosenfeld,* 137 *Atl.* 95 (New Jersey).

An employee who violates rules as to striking matches in a mine where there was likely to be explosive gas takes himself outside of the employment, and his dependents can not recover for death from mine explosion resulting.—*Mizzer vs. Philadelphia & Reading Coal Co.,* 137 *Atl.* 126 (Penn.).

Workman who lost sight of one eye in childhood and then lost the other in course of employment is entitled to compensation for loss of one eye and not for permanent disability.—*Gilmore vs. Lumbermen's Assn.,* 292 *S. W.* 204 (Texas).

Disqualification from the performance of the usual tasks of a workman in such a way as to enable him to procure and retain employment is ordinarily regarded as total incapacity, and such term does not imply an absolute inability to perform any kind of labor.—*Employers' Liability Corp. vs. Williams,* 293 *S. W.* 210 (Texas).

Where rules were established and reasonable diligence used in enforcing them, an employee who went from planing mill into box factory and undertook to operate hazardous machinery, without authority from either foreman, and was injured, is not entitled to compensation.—*Quarles vs. Lumbermen's Assn.,* 293 *S. W.* 333 (Texas).

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ETHICS AND PRACTICE

We note in a recent Law Journal article the designation of the following as a "pitfall in trial practice", to-wit: "After having elicited